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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

BESSEMER & LAKE ERIE RAILROAD COMPANY,
Petitioner,

v.

WHEELING-PITTSBURGH STEEL CORPORATION, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS WHEELING-PITTSBURGH STEEL CORPORATION, SHARON STEEL CORPORATION AND TAURO BROTHERS TRUCKING COMPANY

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In compliance with this Court's order of December 13, 1993, steel company respondents Wheeling-Pittsburgh and Sharon and trucking company respondent Tauro submit this brief addressing petitioner's settlements with four other respondents that resolve the vast majority of the outstanding judgments in these consolidated cases. This Court's review was not warranted even before the settlements were announced. By removing parties that were the focus of the Third Circuit's opinion and the petition, the settlements make these cases a far less appropriate candidate for certiorari today:

- The principal respondents have been dismissed, and the individual claims of the remaining respondents present

fact patterns distinct from those addressed by the courts below.

- In contrast to the settling respondents, whose judgments were awarded largely under federal antitrust law, the majority of the actual damages granted to the remaining respondents were awarded under state law.

- The only respondent (Erie/Codan) whose claims were even arguably based on rates has been dismissed.

- This Court just recently denied certiorari on the question whether *Keogh* bars claims by competitors, one of the same questions petitioner raises here.

- The claims of the settling respondents accounted for approximately three-fourths of the outstanding judgments.

When the petition was filed on October 25, 1993, petitioner challenged judgments aggregating $497.4 million in favor of eight plaintiffs.[1] Petitioner has repeatedly headlined the amount of its liability as a justification for certiorari, referring more than a dozen times to the supposedly "unprecedented award" that "now exceeds $660 million-- more than double the largest judgment previously affirmed in a federal antitrust case." Pet. 1. *See id.* at 2, 6, 7, 10, 15, 16, 18, 22, 30; Pet. Reply Br. 1, 6.[2] Petitioner's settlements eviscerate its reliance on the size of the judgments as a springboard for certiorari.

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1 The petition also sought review of the interlocutory decision on liability entered in favor of respondent Wills (Wills Trucking, Inc. and Toledo World Terminal, Inc.). The court of appeals remanded Wills' claims for a new trial on damages.

2 The substantial discrepancy between the amounts of the judgments and the figures petitioner recites apparently arises from petitioner's addition of post-judgment interest in an effort to magnify the supposed importance of this case. The petition raises no legal issue as to the calculation of interest.

On November 30, 1993, petitioner announced that it had reached an agreement to settle the claims of respondents Republic Steel Corporation (Republic) and Jones & Laughlin Steel Incorporated (J&L) for $375 million. That settlement exceeds by almost $20 million the judgments entered in favor of Republic and J&L.[3] On December 10, 1993, the petition was dismissed under Supreme Court Rule 46.1 as to respondents Republic and J&L, pursuant to a stipulation dated December 9, 1993.

On December 10, 1993, petitioner reached an agreement settling the claims of two other respondents, C.D. Ambrosia Trucking Company (Ambrosia), and Erie-Western Pennsylvania Port Authority and Codan Corporation (Erie/Codan). The amounts of these settlements have not been disclosed, but the judgments in favor of Ambrosia and Erie/Codan aggregated $13.9 million. CA App. 2202-03. On December 17, 1993, the petition was dismissed under Rule 46.1 as to those respondents, pursuant to a stipulation dated December 17, 1993.

The effect of the four settlements is to remove from the case: (1) approximately three-fourths of the outstanding judgments and an even higher percentage of the damages awarded under federal law; (2) the leading steel (Republic and J&L), dock (Erie/Codan) and trucking (Ambrosia) plaintiffs; (3) the only respondent (Erie/Codan) whose damages were even arguably based on rates; and (4) the respondents against whom petitioner's evidence and arguments have been and are principally directed. The settlements significantly alter the essential fact pattern considered by the courts below, leaving only disparate fragments of that mosaic for this Court's review. In the Third Circuit, petitioner's arguments targeted the main steel company and dock plaintiffs, *viz.*, settling respondents Republic, J&L and Erie/Codan. The Third Circuit

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[3] The district court entered separate judgments in the amounts of $197.6 and $158.3 million in favor of Republic and J&L, respectively, for a total of $355.9 million. CA App. 2196-97.

accordingly addressed the issues in the context of those plaintiffs, not in the very different posture that now exists as a result of the post-petition settlements. Any contention by petitioner that the settlements do not weigh heavily against review would simply reflect that the petition is not anchored in the record.

Federal antitrust claims dominated the judgments obtained by the settling respondents; the claims of the remaining respondents are more rooted in state law. In the aggregate, 77% of the judgments entered for the settling respondents were awarded under federal law. Republic obtained the largest judgment in the case, approximately 85% of it under federal law. Ambrosia's damage award was 100% under federal law; state law played no role whatsoever. Those respondents have now been dismissed pursuant to settlement. In contrast, more than half (56.9%) of the single damages awarded to the remaining steel company respondents were granted under Ohio's Valentine Act; and the percentage of state law claims ranges as high as 72.5% for Sharon, one of the remaining steel company respondents. The fundamental nature of the case has thus been transformed from the federal law issues addressed by the Third Circuit and the petition, to predominantly state law claims. Because petitioner failed to raise the state law context of the issues in the court of appeals or in its petition for certiorari, the questions that exist in the post-settlement configuration of the case are not fairly included in the questions presented for review. *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, No. 92-1123 (Nov. 30, 1993).

Other differences distinguish the remaining respondents from those petitioner has dismissed. Contrary to petitioner's undifferentiated attack on "steel company" claims, the claims of the three remaining steel company respondents differ in material ways from the claims that have been settled. For example, petitioner contends that the "steel companies" were indirect purchasers and suffered no antitrust injury. Pet. 22. But petitioner never advanced that

argument against respondent National, a steel company that prevailed on damage claims wholly distinct from the claims of settling steel company respondents Republic and J&L. At trial, National neither sought nor obtained self-unloader damages; it was awarded damages for savings it would have realized in operating its own fleet of vessels. Republic Br. in Opp. 53A. Petitioner's arguments are similarly misdirected against respondent Sharon, which did not obtain compensatory damages on its self-unloader claims and which recovered largely under state law. *Id.* at 67A.

Respondent Wheeling-Pittsburgh also sought damages based on facts distinct from the paradigm set forth in the petition. For example, petitioner attacks as "indirect" the so-called "passed on" savings that "steel companies" would have realized on handling services provided by non-railroad entities. Aside from the fact that petitioner's argument grossly mischaracterizes the Third Circuit's opinion, the argument has no bearing whatever on Wheeling-Pittsburgh's dock-handling damages, which were based entirely on iron ore that was actually handled at docks owned or controlled by the defendant railroads. Unlike Republic and J&L, Wheeling-Pittsburgh neither sought nor obtained damages for iron ore handled at a non-railroad dock. CA App. 10,431. In addition, Wheeling-Pittsburgh was the only plaintiff awarded damages for demurrage claims, and the petition neither challenges, nor even mentions, those claims. *See* Republic Br. in Opp. App. 65A.

As the briefs in opposition explained, petitioner's antitrust standing argument did not warrant certiorari even when Republic and J&L -- the principal targets of that argument and the focus of the Third Circuit's analysis -- were in the case. With the dismissal of the petition as to Republic and J&L, no residual issue of antitrust standing merits this Court's review.

The same is true for petitioner's *Keogh* arguments. As the briefs in opposition noted, the *Keogh* issues set forth in the petition are simply not presented on the record in this

case. The district court dismissed prior to trial the "rate-related" claims attacked in the petition,[4] the jury was instructed that liability could not be imposed for rate-related conduct, and the jury expressly found in answers to special interrogatories as to each respondent now remaining in the case that antitrust injury was caused by non-rate conduct. *See id.* at 52A-54A, 58A-59A.[5] Based on this record, the court of appeals correctly concluded that respondents "proved at trial an antitrust conspiracy that was not rooted in rate-related claims." Pet. App. 34a.

In an effort to manufacture an issue for this Court's review, petitioner distorts this record, clinging instead to the view that "rates were the sole cause of the damages claimed by the respondents." Pet. Reply Br. 1. Petitioner seeks to relitigate in this Court the factual issue of causation that it lost before two juries, the district court on JNOV, and the court of appeals. Petitioner also clings to the argument that the Third Circuit regarded rates as "the primary cause" of injury. *Id.* That plainly mischaracterizes the Third Circuit's analysis of the *Keogh* issues. As petitioner's reply brief acknowledges, the language it targets is culled from the court of appeals' discussion of "non-*Keogh* issues." *Id.* at 2. Petitioner attempts to craft a *Keogh* issue for purposes of certiorari out of snippets from non-pertinent portions of the appellate opinion.

The departure of settling respondent Erie/Codan further alters the case with respect to petitioner's *Keogh* argument. Erie/Codan was the only respondent as to which the record permitted any argument that the railroads' collective denial of commodity line haul rates to private docks was a cause of antitrust injury. The liability jury answered a special

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4 Petitioner continues to rely on dismissed claims. *See* Pet. Reply Br. 7 n.8 (quoting district court order dismissing rate-related claims).

5 Petitioner contends, without citation, that the jury was permitted to impose liability for joint ratesetting. Pet. Reply Br. 4 n.5. The jury was repeatedly instructed and explicitly found to the contrary. CA App. 4971, 4978, 4981, 5029-30. *See* Republic Br. in Opp. 10.

interrogatory finding that the injury suffered by Erie/Codan resulted in part from "acts to prevent Erie from having competitive iron ore rail rates at the Erie ore dock." Republic Br. in Opp. App. 56A. No such finding was made as to any remaining respondent. As to each remaining respondent, the jury expressly found that antitrust injury resulted from non-rate conduct. *See id.* at 52A (Wheeling-Pittsburgh), 53A (National), 54A (Sharon), 58A (Tauro), 59A (Wills).[6]

The absence of respondent Erie/Codan also has a profound effect on the second *Keogh* issue addressed in the petition: whether claims by competitors are barred. Erie/Codan was the only successful plaintiff that directly competed with the railroads in providing dock-handling services. Remaining respondent Tauro is a trucking company that provided land transportation, not docking services, and no steel company plaintiff was awarded damages for trucking claims. Wills' claims have been remanded for a new trial on damages.

Subsequent to the filing of the petition and the briefs in opposition, this Court denied certiorari on precisely the question presented in this case: whether *Keogh* should be expanded to bar claims of competitors. *Lifschultz Fast*

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[6] Just as the court below rejected petitioner's characterization of the facts, the District of Columbia Circuit in the criminal case also rejected B&LE's effort to masquerade unlawful non-rate conduct as "rate-related." *United States v. Bessemer & Lake Erie R.R.*, 717 F.2d 593, 601 (D.C. Cir. 1983). Contrary to petitioner's contention that the District of Columbia Circuit had no reason to consider "the extent to which the defendants effectuated their conspiracy through tariffed rates" (Pet. Reply Br. 2 n.3), B&LE's appellate briefs in the criminal case repeatedly stressed that very point. *See, e.g.*, Brief for Appellant B&LE, No. 82-2065 (D.C. Cir.) at 13 ("the indictment is predicated upon alleged rate activity"), 18 (the indictment "challenges not merely the . . . dock handling charges, but also the level of the charges as applied to self-unloading vessels"), 25 & n.29 ("the indictment involves a direct challenge to collective railroad rate activity"); Reply Brief for Appellant BL&E, No. 82-2065 (D.C. Cir.) at 4 ("rate action which forms the heart of the indictment"), 23 ("principal allegations in the indictment" challenged rate conduct; "government's attack on the substance of particular railroad rates and charges"). Both the District of Columbia Circuit and the Third Circuit saw through the transparently false version of the facts petitioner asserts once again in this Court.

Freight, Inc. v. Consolidated Freightways Corp., No. 93-549, *cert. denied*, Nov. 29, 1993. This case is less worthy of review than was *Lifschultz*. First, the claims in *Lifschultz* arguably challenged filed rates so the case at least included *Keogh*-type claims; this case does not include such claims. Second, the claims in *Lifschultz* involved conduct that occurred following the deregulation of motor carrier transportation in 1980. *See* 805 F. Supp. 1277, 1288 (D.S.C. 1992). This case was decided solely on the basis of the superseded regulatory regime that existed before it was drastically altered by Congress and the Interstate Commerce Commission; this case is a relic of a long bygone era in federal transportation regulation. Since the damages period for the state law claims -- which now predominate -- ended in 1977, the case is today even more of an anachronism that it was when the petition was filed.

Petitioner asserts that this Court has addressed the filed-rate doctrine in several cases over the past few years. Pet. Reply Br. 6 n.7. But all of those cases, unlike this one, arose under the present statutory and regulatory schemes and therefore buttress the conclusion that review should be denied here.

For the reasons stated above and in the briefs in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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